

the tree to the edge of the road was 45 feet. After it fell its root was inspected but no sign or symptom of root disease was found. That night was the only occasion a rubber tree from this estate had fallen on the highway although there had been cases of branches falling and infringing the highway.

Great play was made as to the size of the head of the tree in question. The manager of the estate was asked the following question: "Q. Knowing that the rain was heavy and there was possibility of trees falling what steps did you take to prevent any tree from falling?" "A. Except for normal inspection to see if there was any tree in danger of toppling we did not take any other step. No special steps were taken. There is no way to tell whether a tree will topple until it topples over."

The issue seems to me to be a broader and more general one, viz., in the case of an apparently healthy rubber tree, ought its owner to have it lopped or topped because either wind or weather condition might cause it to be uprooted? Unless one is to take the view that every rubber tree growing beside a main highway should be lopped and topped and that its owner is guilty of negligence unless he so treats it, I see no reason for imputing a want of care on the part of its owner. But as I understand the judgment of the learned judge, however, he took the view that the tree fell because of weather and wind conditions causing it to be unbalanced and fall, and not because of want of due care on their part to see that the tree was dangerous. It had rained for the past ten days with a recorded rainfall of 6.16 inches for the first seven days of September. But there was nothing exceptional about the rain or the wind that night. There was also nothing exceptional about the canopy or foliage of this particular tree. Apart from the testimony of the manager no evidence of the size of the head was given on behalf of the respondents. I do not regard the evidence as establishing that the rubber tree in question was so plainly a danger as to require it being lopped or topped lest it should fall though it was healthy and regular examination did not raise a doubt as to its general condition. If such a duty existed, there would be a vast number of negligent estate owners who are only saved from liability owing to the chance that their rubber trees have in fact resisted the weather tending to make them fall.

I must approach the question of nuisance on the basis of the learned judge's finding that there was no negligence on the part of the third party in respect of the fallen tree. It was argued that, apart from the issue of negligence, by the mere fact that the tree was left unattended and without any proper warning sign so that it could not be seen, it was a dangerous obstruction in the highway and so a nuisance. Consequently an absolute duty was imposed on the third party to light it or otherwise effectively guard it to prevent accidents.

That is a proposition which I refuse to accept. If a tree adjoining a highway falls on the road without any negligence on the part of its owner, and the said tree causes an obstruction to the said highway, it is wrong to suppose that *ipso facto* and immediately a nuisance is created. The keynote of his

A responsibility is knowledge or means of knowledge. Thus, a nuisance will obviously be created if, knowing or having the means of knowing of its existence, he allows it to continue for an unreasonable time or in unreasonable circumstances, but the mere fact that an obstruction has come into existence cannot overnight turn it into a nuisance. Each case must be examined whether or not a nuisance is created. If that were not so, it would seem that every landowner who owns trees adjoining a highway would be turned into an insurer. That in my opinion would run contrary to the recognised law on the question of nuisance to highways. In the present case, the third party having been found not guilty of negligence, there remained nothing but the allegation of nuisance. In my opinion, on the evidence the learned judge was right in not deciding that question. The allegation of nuisance was not satisfied.

The appeal by the appellants against the respondents is allowed with costs here and full costs in the court below.

D The appeal by the respondents against the third party is dismissed with costs.

Wan Suleiman and Chang Min Tat F.JJ. concurred.

Order accordingly.

E Solicitors: Chor Pee & Hin Hiong; Mah Kok & Din; Shearn Delamore & Co.

YAP CHEE MENG v. AJINOMOTO (MALAYSIA) BERHAD

[O.C.J. (Harun J.) January 19, 1976]

[Kuala Lumpur — Civil Suit No. 830 of 1975]

F *Practice and Procedure — Claim for damages based on negligence — Settlement negotiated by solicitors — Whether settlement could be challenged by client — Public policy — Grounds for setting aside settlement.*

G *Legal Profession — Advocate and solicitor — Settlement negotiated by solicitor — Whether could be challenged by client — Public policy — Grounds for setting aside the settlement.*

Damages — Claim for — Settlement negotiated by solicitors — Whether client could challenge settlement.

H The plaintiff had been injured while performing his work at the factory of the defendants and had been blinded as a result of the accident. He instructed solicitors who arranged a settlement of his claim. The plaintiff subsequently repudiated the settlement and brought an action for damages.

Held: (1) as a general rule it is against public policy to allow settlements between solicitors on behalf of their respective clients in accident cases to be challenged with impunity;

(2) a settlement like other contracts is voidable on specific grounds, as for example, undue influence, misrepresentation, fraud or mistake;

I (3) in this case the plaintiff had not shown any such specific grounds and therefore the application of the defendants to strike out the writ of summons must be allowed.

Cases referred to:-

- (1) *Filmer v. Delber* 128 E.R. 192.
- (2) *Mathews v. Munster* (1887) 20 Q.B.D. 141.
- (3) *Welsh v. Rae* (1918) 118 L.T.R. 529.
- (4) *Neale v. Gordon Lennox* [1902] A.C. 465.

- (5) *Shepherd v. Robinson* [1919] 1 K.B. 474.
- (6) *Marsden v. Marsden* [1972] 2 All E.R. 1162.
- (7) *Clifford Davies Management Ltd. v. W.E.A. Records Ltd. & Anor.* [1975] 1 W.L.R. 61.
- (8) *Gilbert v. Endean* (1878) 9 Ch. D. 259.
- (9) *In re Roberts* [1905] 1 Ch. D. 704.
- (10) *Emeris v. Woodward* (1890) 43 Ch. D. 185.

CIVIL SUIT.

D. Puthuchear for the plaintiff.

N.A. Marjoribanks for the defendants.

Harun J.: The plaintiff was employed by the defendants company. On November 22, 1971 while performing his work of opening the valves of pipelines in the defendants' factory, liquid ammonia was splashed on the plaintiff's face causing blindness. He received treatment immediately after the accident at a hospital in Petaling Jaya, later in China and finally in Singapore incurring medical expenses of \$5,799 which were paid for by the defendants. He has not been able to do any work since the accident but the defendants continued to pay his monthly salary until September, 1974 amounting to \$9,481.63 cts.

In June 1972, the plaintiff instructed this solicitor AEH to claim compensation from the defendants. AEH initially corresponded with the defendants direct but on October 19, 1973 filed a writ of summons against the defendants claiming damages for the accident in Kuala Lumpur High Court Civil Suit 1108/73. The insurers of the defendants instructed their solicitors to act on behalf of the defendants. In their statement of defence they denied negligence or in the alternative pleaded contributory negligence by the plaintiff. After long negotiations between the solicitors the plaintiff's claim was finally settled on March 4, 1975 for the sum of \$42,000 in full settlement inclusive of costs. A cheque for \$42,000 was issued by the insurers on the same day which was sent to AEH who acknowledged its receipt and also returned to the defendants' solicitors the Discharge Voucher signed by the plaintiff acknowledging receipt of the \$42,000 "in full satisfaction and discharge of all claims accrued or to accrue in respect of all injuries or injurious results, direct or indirect, that have arisen or may arise from an accident sustained by me on 22 day of November, 1971 while in the employment of the above". On March 19, 1975 the solicitors for both parties jointly signed a notice of withdrawal which was filed in court on March 24, 1975 and the suit was accordingly withdrawn. On May 29, 1975 the plaintiff's present solicitors filed a new writ of summons claiming damages for the accident of November 22, 1971 against the defendants. On June 12, 1975, the defendants entered a conditional appearance and on June 20, 1975 took out this summons-in-chambers to strike out the new writ of summons on the grounds that the matter had been settled in the earlier suit. By consent this summons-in-chambers was adjourned to open court for argument.

The plaintiff resists this application on several grounds, the main ones being that he gave instructions to his solicitor AEH not to settle out of court; he never gave his consent to the settlement and that there is no valid discharge.

A In accident cases it is the accepted practice after the pleadings have been filed in court and before trial for the solicitors of both parties to negotiate a settlement. It is a good practice as it saves time and costs. Accident victims receive their compensation money much earlier than if the matter had gone to trial. Every year thousands of accidents occur on our roads, factories and plantations and if all these cases had to be tried by the courts it will take years before a case can be heard under the existing capacity of our courts, the only other alternative being to build more Court Houses and appoint more judges. In any event, in the majority of cases the dispute is usually confined to the quantum of damages. It is usual during the course of negotiations for solicitors to consult their clients, give legal advice and receive instructions. Once settlement has been reached, payments made and the relevant documents signed, that should be the end of the matter.

B In this case, as far as the defendants' solicitors are concerned the negotiations with plaintiff's solicitor AEH were conducted in the usual manner. The amount settled took into account contributory negligence on the part of the plaintiff, the medical expenses paid for his treatment and the payment of his monthly salary for a period of nearly three years after the accident. The Discharge Voucher had been signed by the plaintiff himself and they had paid out the full sum of \$42,000. All along they had been led to believe and still do that solicitor AEH had full authority to negotiate a settlement. According to the affidavit in reply by the solicitor AEH the plaintiff agreed to a settlement out of court and in fact pressed him for an early settlement. His client saw him several times and the matter was handled not only by him but also by his assistant, another solicitor of the same firm. Copies of all his firm's letters to defendants' solicitors were sent to plaintiff to keep him informed of the progress of the negotiations. It was his professional opinion that the sum offered was reasonable in the circumstances.

C The plaintiff in his two affidavits says differently. His instructions were not to settle out of court and he kept on insisting that the case be brought to trial. Of the \$42,000, he only received a cheque for \$31,500 on March 14, 1971, the balance of \$10,500 having been retained by AEH as professional charges. On May 19, 1975 the plaintiff through his present solicitors returned the \$31,500 cheque to solicitor AEH. He says therefore he has not received a single cent and as far as he is concerned there is no settlement. The plaintiff in his affidavits has also made some very serious allegations against his solicitor AEH and concludes that the amount of damages in his case should be \$90,000 or more and he has consequently suffered an injustice.

D It is quite clear, therefore, that there are two contradicting versions of what exactly were the instructions plaintiff gave to his solicitor AEH. Whatever may the truth be, how does it affect the defendants. This raises the question with regard to the relationship between solicitor and client. It is settled law that a solicitor once retained has full authority to act on behalf of his client and this authority extends to negotiations to effect settlement out of court.

There is, however, a conflict of authority in the case where there is a limitation of authority by the client. In 1811 in *Filmer v. Delber*⁽¹⁾ Mansfield C.J. refused to interfere when a defendant claimed that she had expressly desired her attorney not to consent to any rule of reference after the attorney and counsel had expressed agreement to refer and suggested that the defendant's remedy is by action against her attorney. He said: "There would be no end to these applications if the court were to interfere; such interference would lead to collusion; when a party did not like the prospect of the reference, he would say that he had never given his attorney authority to refer." In *Mathews v. Munster*⁽²⁾ the Court of Appeal held that the consent of the client is not needed for a matter which is within the ordinary authority of counsel, and, if a compromise is entered into by counsel in the absence of the client, the client is bound. And in *Welsh v. Roe*⁽³⁾ it was held that where an action has been commenced, the solicitor retained has an implied authority to compromise the action and no limitation of such implied authority can be relied upon by the client as against the other side unless such limitation had been brought to the knowledge of the other side before the compromise was arranged.

However in *Neale v. Gordon Lennox*⁽⁴⁾ the court interfered when counsel exceed his authority. In *Shepherd v. Robinson*⁽⁵⁾ counsel had consented to judgment without knowing that his client had told the solicitors that the case was not to be settled and the court ordered that the case be restored to the list for hearing. And in *Marsden v. Marsden*⁽⁶⁾ the court interfered when counsel acted against express instructions.

On a review of the cases, it seems to me that each case should be decided on its merits. As a general rule, it is against public policy to allow settlements concluded between solicitors on behalf of their respective clients in accident cases to be challenged with impunity. To do so would open the flood-gates of endless litigation initiated by parties who become wise after the event. It will also discourage the practice of out of court settlements. That would be a great pity. But a settlement is a contract and like all contracts it is voidable on specific grounds e.g. undue influence, misrepresentation, fraud or mistake. If this can be shown it is then the duty of the court to interfere so that justice is done.

In this case, *prima facie* there is a valid settlement, conducted between advocates and solicitors of this court. There can be no allegation of inequality of bargaining power as was the case in *Clifford Davis Management Ltd. v. W.E.A. Records, Ltd. & Anor.*⁽⁷⁾ However, if the allegations of the plaintiff are true, then a grave injustice has been done to a blind man. But affidavit evidence alone will not suffice: see *Gilbert v. Endean*⁽⁸⁾ The allegations are against a member of the Bar who is an officer of this court concerning his professional conduct. He has strenuously denied in his affidavit in reply every allegation made by the plaintiff. It is for the plaintiff to prove these allegations. He has not done so. The remedy of the plaintiff is to commence an action to set aside the

settlement: see *In re Roberts*⁽⁹⁾ *Emeris v. Woodward*⁽¹⁰⁾ In the meantime, the settlement out of court stands and I would grant the order in terms of the summons-in-chambers with costs.

Order accordingly.

Solicitors: *Skrine & Co.; Lovelace & Hastings.*

E. GOPAL & ANOR. v. AWANG BIN MONA

[A.C.J. (Syed Agil Barakbah J.) November 28, 1976]

[Alor Star — Civil Appeal No. 3 of 1976]

Tort — False imprisonment — Damages — Arrest and detention under Emergency (Public Order and Prevention of Crime) Ordinance, 1969 — Error of effective date of detention order — Rectification by Asst. Secretary — Meaning of "good faith" — Unlawful detention for one day — Emergency (Public Order and Prevention of Crime) Ordinance, 1969, ss. 3(1), 3(3), 4(1), 4A, 4B — Government Proceedings Ordinance 1956, ss. 5, 6(2) & 39 — Police Act 1967, s. 32(1) — Emergency (Essential Powers) Ordinance, 1969, s. 5.

The respondent was arrested on June 8, 1973 and detained in the police lock-up, Alor Star, under section 3(1) of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969 till June 9, 1973 and at Alor Star prison from June 10, 1973 to August 6 1973, altogether for a period of sixty days under section 3(3) of the said Ordinance. On June 1, 1973, the first appellant, the officer in charge, applied to the Minister of Home Affairs for a detention order under section 4(1) of the Ordinance. Due to an oversight the date of the respondent's arrest was erroneously stated as at June 9, 1973 instead of June 8, 1973. At the Ministry, the Assistant Secretary recommended that a detention order be issued and take effect from August 8, 1973, i.e., immediately upon the expiry of the sixty day period calculated on the basis that the respondent was arrested on June 9, 1973. The Minister signed the detention order on July 24, 1973 but it was sent to the first appellant on August 5, 1973. The error was then discovered. The Assistant Secretary altered the date on the said order by erasing the figure "8" and superimposed over it with the figure "6", thereby purporting to alter the effective date to August 6, 1973. He did not refer the alteration to the Minister for his initials because the Minister had passed away.

The court had to decide whether the detention order as altered by the Assistant Secretary subsequent to its issue by the late Minister was valid and effective. The learned President awarded the plaintiff damages for false imprisonment. The defendants appealed.

Held, allowing the appeal: (1) so long as the exercise of the powers by the Minister was done within the ambit of the Ordinance which Parliament had given him the power to exercise and was done *bona fide*, the question as to his competency or otherwise was not within the competence of the court. All that the court could do was to see that the power which it claimed was one which fell within the four corners of the Ordinance, that it was exercised in good faith and also to see whether the order directed that to be done which the Ordinance gave the Minister the authority to direct;

(2) the late Minister in issuing the detention order acted in pursuance of his statutory powers. Any alteration to the order including the date of its commencement must be made or initialled by him, and on his demise, by the Assistant Minister if no Minister had yet been appointed in his place. The Assistant Secretary had no power under the Ordinance to make such alteration;

(3) the date formed part and parcel of the order. Therefore, its unauthorised alteration would render the order ineffective;

(4) the meaning of "good faith" within the context of the Emergency (Essential Powers) Ordinance, 1969 included due inquiry and implied not only an upright mental attitude but also clear conscience and that ordinary prudence had been exercised according to the standard of a reasonable person;